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IN THE

Supreme Court of the United States

October Term, 1964.

No. 201.

WILLIAM W. SCRANTON, Governor, et al.,
Appellants,

v.

IRA WALTON DREW, et al.,
Appellees.

On Appeal From the United States District Court for the Middle District of Pennsylvania.

MOTION TO AFFIRM.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 201.

WILLIAM W. SCRANTON, ET AL.,
Appellants,

v.

IRA WALTON DREW, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

MOTION TO AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the questions raised by appellants have been decided by this Court in its recent decisions on state legislative apportionment and are, therefore, so insubstantial as not to warrant further argument.

QUESTIONS PRESENTED.

1. Whether a legislative apportionment scheme which requires that each of the State's 67 counties, regardless of population, elect at least one member to the House of Representatives, as a result of which the maximum population-variance ratio thereunder reaches 18 to 1, and 43.2% of the total population of the State elect the majority of the House of Representatives, contravenes the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the provision of the Pennsylvania Constitution which prevents a county containing five or more ratios from receiving an additional representative unless it has a full population ratio, while on the other hand permitting a county containing four or fewer ratios to receive an additional representative with a majority fraction of a ratio, contravenes the Equal Protection Clause where there was a finding that there is no rational basis for this provision.

3. Whether an apportionment scheme for the Pennsylvania Senate, as a result of which the maximum population-variance ratio is greater than 2.5-to-1, and substantially under-represented senatorial districts adjoin substantially over-represented senatorial districts contravenes the Equal Protection Clause of the Fourteenth Amendment.

4. Whether the provision in the Pennsylvania Constitution which limits the number of senators that may be elected from any county no matter how many persons it contains contravenes the Equal Protection Clause of the Fourteenth Amendment, when this provision admittedly was inserted in an effort to curb the political influence of the urban areas of the State.

5. Whether the provisions of the Pennsylvania Representative Apportionment Act creating 116 single-member districts and 39 multi-member districts which are allocated in a manner following no logical or consistent pattern, whereby single counties contain a conglomeration of single-member districts, two-member districts, three-member districts and four-member districts, and whereby adjoining counties with common socio-economic characteristics contain different patterns of single-member and multi-member districts, are so irrational and arbitrary as to contravene the Equal Protection Clause of the Fourteenth Amendment.

6. Whether the fact that inequalities and disparities in representation are compelled by the Pennsylvania Constitution insulates the implementing legislation from the mandate of the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT.

A. History of the Case.

This is a direct appeal from the final judgment and decree entered on April 9, 1964, by a District Court of three judges specially constituted pursuant to 28 U. S. C. §§ 2281 and 2284, enjoining appellants from enforcing the 1964 Acts apportioning the Pennsylvania General Assembly or performing any duties under the Pennsylvania Election Code in connection with any primary or general election of state senators or representatives pursuant thereto.

On November 22, 1963, appellees, Ira Walton Drew, et al., filed in the United States District Court for the Middle District of Pennsylvania Civil Action No. 8293 against the Governor of the Commonwealth and various other state officials, including the presiding officers of both houses of the legislature, to enjoin the enactment and enforcement of reapportionment legislation then being considered by a Special Session of the General Assembly. Appellees alleged that the proposed legislation provided for an apportionment of the Senate and House of Representatives which was so grossly disproportionate as to be invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. After a hearing on a preliminary injunction, appellees' application was denied on the ground that the action was brought prematurely. The denial was without prejudice to appellees' right to seek relief under their complaint upon enactment of the legislation.

On January 9, 1964, the Governor signed the two acts which had been enacted by the Special Session of the General Assembly of 1963 on Reapportionment: (1) the Act of January 9, 1964, P. L. 1419, Pa. Stat. Annot. tit. 25, §§ 2221-22 (1963 Supp.) (hereinafter called the Representative Apportionment Act), fixes the number of representatives in the General Assembly of the Commonwealth and

apportions the State into representative districts; (2) the Act of January 9, 1964, P. L. 1432, Pa. Stat. Annot. tit. 25, §§ 2217-20 (1963 Supp.) (hereinafter called the Senatorial Apportionment Act), fixes the number of senators in the General Assembly of the Commonwealth and apportions the State into senatorial districts.

On January 15, 1964, appellees, Michael Johnson, et al., filed Civil Action No. 8338 in the Middle District of Pennsylvania against George I. Bloom, Secretary of the Commonwealth, attacking the validity of these acts and moved to consolidate their suit with the pending action. At a hearing held on January 16 and 17, 1964, the three-judge District Court granted the Motion for Consolidation, denied the Commonwealth's motions for a stay and for equitable abstention, and the cases proceeded to hearing and determination on their merits.

The three-judge District Court granted appellees' prayer for relief on the grounds that both the Representative Apportionment Act and the Senatorial Apportionment Act were invidiously discriminatory and denied appellees and others similarly situated of their constitutional rights to the equal protection of the laws.[1]

On April 14, 1964, upon motion of appellants, the three-judge District Court stayed its judgment to permit appellants to prosecute their appeal to this Honorable Court. This appeal followed. On July 2, 1964 appellees filed an Application to Remand Record to Consider Vacation of Stay and Further Relief. On July 8, 1964 Mr. Justice Brennan denied the application.

B. The Legislative Apportionment Scheme.

In Pennsylvania, the legislative apportionment scheme results from the Pennsylvania Constitution and implementing legislation, required by Article II, § 18 of the Constitu-

1. The opinion of the United States District Court for the Middle District of Pennsylvania is reported at 229 F. Supp. 310 (M. D. Pa. 1964).

tion to be enacted after every census.[2] The Constitution is in effect the blueprint, and the individual acts provide the actual structure of apportionment.

1. The House of Representatives.

a. *The Constitution.*

Article II, § 17 of the Constitution governs the apportionment of the House of Representatives. Under this provision the population of the State ascertained at the most recent Federal census is divided by 200. The quotient thus obtained becomes a "ratio" which is then used in the allocation of representatives. The Constitution itself does not provide for the number of representatives.

Under the Constitution each county is entitled to at least one representative. As to those counties entitled to more than one representative: those with *fewer* than five full ratios receive an additional representative for each full ratio and for each remaining *fraction* of a ratio exceeding one-half; on the other hand, counties containing five or *more* ratios receive an additional representative only for each full ratio.

Each city with a population equal to a ratio must be allocated a separate representative. Each city entitled to more than four representatives and each county exceeding 100,000 inhabitants must be divided into compact and contiguous representative districts. No district may elect more than four representatives.

b. *The Legislation.*

The Representative Apportionment Act, following the blueprint of the Pennsylvania Constitution, created 209 representative seats which are allocated among 155 repre-

2. All of the constitutional provisions and legislation referred to in this case are set forth in Appendix B to Appellants' Jurisdictional Statement.

sentative districts within the Commonwealth. Of these districts, 116 are single-member districts and 39 are multi-member districts.

2. The Senate.

a. *The Constitution.*

Article II, § 16 of the Pennsylvania Constitution provides for the apportionment of the Senate. Under this provision the State must be divided into 50 single-member senatorial districts of "compact and contiguous territory as nearly equal in population as may be. . . ." Thus the quotient thereby obtained becomes a "ratio" for the purpose of allocating senatorial districts.

Each county containing one or more ratios of population is entitled to elect one senator for each ratio and to elect an additional senator for a surplus of population exceeding three-fifths of a ratio.

An individual county cannot receive a separate senator, however, unless it contains population equalling four-fifths of a ratio. This is subject to an exception where adjoining counties each have population entitling them to at least one senator. In this event, a county with population amounting to less than a full ratio can receive a single senator for population exceeding one-half of a ratio.

Under the Constitution, a county cannot be divided for the purpose of creating a senatorial district unless it is entitled to at least two senators. And no ward, borough or township can be divided in the formation of a district.

Finally, the Constitution limits any city or county to one-sixth of the total number of senators—namely, eight.

b. *The Legislation.*

The Senatorial Reapportionment Act creates 50 districts. In certain instances, one senator is allocated to a county. In other instances a county receives more than one senator. And in still other instances, groups of counties a combined to form a single senatorial district.

ARGUMENT.

Despite the recent historic decisions of this Court,[3] which delineated the standards of the Equal Protection Clause of the Fourteenth Amendment in legislative apportionment cases, appellants, in requesting this Court to note probable jurisdiction, have conjured up imaginary issues, have raised fallacious arguments not presented to the court below, and have distorted and misinterpreted the opinion of Senior Judge Maris which anticipated this Court's decisions with remarkable prescience. The appeal of the Commonwealth of Pennsylvania, therefore, should be treated as were the appeals in the legislative apportionment cases from the other states which were affirmed summarily on the basis of this Court's initial opinions.[4]

The court below decided (1) that the representative districts delineated by the House Apportionment Act are grossly disproportionate in population; (2) that the constitutional device for allocation of additional representatives to counties entitled to more than one representative arbitrarily and irrationally deprives certain counties of additional representatives; (3) that the motley configuration of multi-member representative districts created by the House Apportionment Act for partisan reasons is arbi-

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3. *Reynolds v. Sims*, 84 S. Ct. 1362 (1964); *WMCA, Inc. v. Lomenzo*, 84 S. Ct. 1418 (1964); *Maryland Committee for Fair Representation v. Tawes*, 84 S. Ct. 1442 (1964); *Davis v. Mann*, 84 S. Ct. 1453 (1964); *Roman v. Sincock*, 84 S. Ct. 1462 (1964); *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 84 S. Ct. 1472 (1964).

4. *Williams v. Moss*, 84 S. Ct. 1907 (1964) (Oklahoma); *Pinney v. Butterworth*, 84 S. Ct. 1918 (1964) (Connecticut); *Hill v. Davis*, 84 S. Ct. 1918 (1964) (Iowa). See also *Swann v. Adams*, 84 S. Ct. 1904 (1964) (Florida); *Nolan v. Rhodes*, 84 S. Ct. 1906 (1964) (Ohio); *Germano v. Kerner*, 84 S. Ct. 1908 (1964) (Illinois); *Marshall v. Hare*, 84 S. Ct. 1912 (1964) (Michigan); *Hearne v. Smylie*, 84 S. Ct. 1917 (1964) (Idaho), where decisions upholding the validity of state apportionment schemes were reversed summarily on the basis of this Court's initial opinions.

trary and irrational; (4) that the senatorial districts delineated by the Senatorial Apportionment Act are grossly disproportionate in population; and (5) that the constitutional limitation on the number of senators which Philadelphia County can elect is discriminatory.

Appellees submit that these decisions with respect to the validity of the apportionment of both houses of the Pennsylvania legislature unquestionably are correct and are in conformity with the constitutional principles set forth in this Court's initial legislative apportionment opinions.

I. The Lower Court's Decision With Regard to the Invalidity of the Apportionment in the Pennsylvania House of Representatives Is Correct.

A. The Pennsylvania Constitutional Requirement That Each County Be Given One Representative Regardless of Population Is Invalid.

1. *The Representative Districts Are Grossly Disproportionate.*

In *Reynolds v. Sims*, 84 S. Ct. 1362, 1385 (1964), this Court stated:

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both Houses of a bicammeral state legislature must be apportioned on a population basis."

There can be no question that the Pennsylvania House of Representatives created by the House Apportionment Act does not comply with this requirement. The three-judge District Court made specific findings which demonstrate conclusively the gross disparities of population within various representative districts in Pennsylvania.

Under the Representative Apportionment Act, there are counties in which legislators represent as many as 18 times the number of persons represented by legislators

from other counties. For example, six counties—namely, Clearfield with a population of 81,534; Armstrong with a population of 79,524; Centre with a population of 78,580; Crawford with a population of 77,956; Somerset with a population of 77,450; and Indiana with a population of 75,366, are assigned only one representative each, or a total of six representatives for an aggregate population of 470,410. Six other counties—namely, Forest with a population of 4,485; Sullivan with a population of 6,251; Cameron with a population of 7,586; Pike with a population of 9,158; Fulton with a population of 10,597; and Juniata with a population of 15,874, are also assigned one representative each, or a total of six representatives for an aggregate population of 53,951 (Findings of Fact 38-39, J. S. A57-58).[5]

The above findings illustrate dramatically the population disparities which exist as a result of the House Apportionment Act. In addition, the Court found that the counties which are under-represented in the House of Representatives are primarily the densely populated or urban and suburban counties. On the other hand, the counties which are over-represented in the House are primarily the sparsely populated or rural counties, although certain rural counties are under-represented. Moreover, certain over-represented rural counties adjoin under-represented counties (Findings of Fact 40-42, J. S. A58).

A finding was also made that, when the vote is considered by subdivisions within the counties, districts with a combined population of 4,887,887 or 43.2% of the total population of the State elect 105 representatives, a majority of the House (Findings of Fact 45, J. S. A59).

In *Reynolds v. Sims*, 84 S. Ct. 1362 (1964), this Court held that the apportionment plan for the Alabama House of Representatives adopted by the district court whereby

5. All page references preceded by the letters "J. S." are to Appellants' Jurisdictional Statement.

43% of the population could elect a majority of the House and whereby the maximum population—variance ratio was 4.7-to-1 was invalid. Clearly, the apportionment of the Pennsylvania House of Representatives whereby 43.2% of the people can elect a majority of the representatives and the maximum population—variance ratio is 18-to-1 is far more inequitable than is the apportionment of the Alabama House considered in *Reynolds*.

2. *The Court Below Fully Respected Political Boundaries.*

Appellants charge the lower court with requiring the disregard of county political lines in the construction of representative districts (J. S. 18). This is unfounded because the court below expressly recognized the existence of the county as a governmental unit and territorial focus for a community of interests (229 F. Supp. 310, 319, J. S. A24). The court concluded, however, that the great population disparities in the representative districts created by the House Apportionment Act are compelled by the provision in Article II, § 17 of the Pennsylvania Constitution which guarantees each county, regardless of population, at least one representative and in order to reduce these disparities ruled that a county with a population of less than one-half of a ratio could not be entitled to separate representation. The Court stated (229 F. Supp. 310, 324, J. S. A32):

> "The defendants urge that county lines should be respected and we have agreed in general with that proposition. We agree . . . . that the use of the county as a unit of representation will not run afoul of the equal protection clause to the extent that such use may involve departing from strict equality of representation. But we think that the disparities which result must operate in a purely random and unpremeditated way, and must not exceed or fall short of, as the results of a particular census may dictate, the statewide ratio population by more than a major fraction."

This conclusion clearly is merited by this Court's decisions in *Reynolds v. Sims*, 84 S. C. 1362 (1964) and *WMCA, Inc. v. Lomenzo*, 84 S. Ct. 1118 (1964),[6] wherein state constitutional and statutory provisions embodying similar guarantees of one representative for each county regardless of population were held to be invalid. Obviously, such a guarantee, even when contained in a state constitution, cannot justify population imbalance and insulate a discriminatory apportionment scheme from the mandate of the Equal Protection Clause.

Although this Court indicated that states can depart from the requirement of mathematical exactness in order to recognize political subdivisions, such a deviation from representation according to population is valid only "so long as the resulting apportionment was one based substantially on population and the equal population principle was not diluted in any significant way." *Reynolds v. Sims, supra* at 1390. Where representative districts vary in population from 8 to 18 times, the equal-population principle is diluted in a significant way. Such palpable discrimination cannot be permitted in the guise of preserving separate representation for each county. As this Court stated in *Reynolds v. Sims, supra* at 1391:

> "However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result in many States, in a total subversion of the equal-population principle in that legislative body."

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6. See also *Nolan v. Rhodes*, 84 S. Ct. 1906 (1964) (Ohio) and *Hill v. Davis*, 84 S. Ct. 1918 (1964) (Iowa), which also involved apportionment schemes guaranteeing one representative per county.

B. The Pennsylvania Constitutional Device for Allocation of Additional Representatives Also Is Invalid.

The gross population disparities in the representative districts compelled by the constitutional requirement of at least one representative per county, although sufficient in and of themselves to justify the invalidation of the legislation, do not complete the discriminatory pattern of the House apportionment scheme. There is also discrimination in the allocation of representatives to counties entitled to more than one representative.

Under Article II, § 17 of the Pennsylvania Constitution, where a county is entitled to more than one representative, those counties with fewer than five full ratios receive an additional representative for each full ratio and for each remaining fraction of a ratio exceeding one-half; on the other hand, counties containing five or more ratios receive an additional representative only for each full ratio.

As applied to the House Apportionment Act, this provision results in the under-representation of two densely populated urban counties. Allegheny County with a population of 1,628,587, equal to 28.78 representative ratios, is assigned only 28 representatives; Delaware County with a population of 553,154, equal to 9.77 representative ratios, is assigned only 9 representatives. Neither of these counties receives an additional representative for its .78 and .77 of a ratio, respectively. On the other hand, *six counties*: Beaver with a population of 206,948, equal to 3.66 representative ratios; Cambria with a population of 203,283, equal to 3.59 representative ratios; Chester with a population of 210,608, equal to 3.72 representative ratios; Franklin with a population of 88,172, equal to 1.56 representative ratios; Lebanon with a population of 90,853, equal to 1.61 representative ratios; and Northampton with a population of 201,412, equal to 3.56 representative ratios, *are each assigned additional representatives for their fractions of*

a representative ratio, all of which are less than the fractions in Allegheny and Delaware Counties (Findings of Fact 45, J. S. A59).

The court below held this provision to be invidiously discriminatory

> "since its only possible purpose and effect is to reduce the number of representatives allotted to the more populous counties below what it would be on a proportional basis, and thereby to increase the representation accorded to the people of the more sparsely populated rural counties above the basis." (229 F. Supp. 310, 325, J. S. A34)

There is no justification under the Equal Protection Clause for such a discriminatory provision which arbitrarily deprives the voters of two counties of additional representatives. In condemning this particular provision of the Pennsylvania Constitution providing for the allocation of additional representatives, the court below anticipated correctly the function subsequently assigned to it in *Reynolds v. Sims*.

> "Lower courts can and will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." (84 S. Ct. at 1390)

C. The Commonwealth's Remaining Arguments Are Fallacious.

Appellants attack the lower court's opinion on the grounds that the court, in concluding that invidious discrimination exists, based its decision upon *population* figures and not upon "*voting characteristics*"—apparently, voting registration figures (J. S. 17-18). This distinction was not presented or argued in the court below. Upon

analysis it is no less fallacious than the other arguments presented by appellants. If one examines the voting registration of those representative districts in which the greatest disparity of population exists, the maximum population—deviation ratio is not significantly reduced. The ratios still are grossly disproportionate and, thu , unconstitutional. Somerset County has 39,562 registered voters; Armstrong County, 38,853; Clearfield County, 37,132; Indiana County, 36,283; Centre County, 30,074; and Crawford County, 32,400. All of these counties receive one representative each. Forest County has 2,622 registered voters; Sullivan County, 3,507; Cameron County, 3,820; Pike County, 6,648; Fulton County, 5,042; and Juniata County, 8,524 (J. S. C8-C10). These counties similarly receive one representative each. The maximum voter registration-deviation ratio is 15.1-to-1. Therefore, the Commonwealth has no basis for urging that there is any substantial difference between population figures and voter registration figures.

The Commonwealth also argues that the discrimination in the House of Representatives is insignificant, because the changes suggested by the court below "would affect only 6 percent of the membership of the House" (J. S. 16). This argument totally misconstrues the mandate of the Equal Protection Clause. In determining whether there is invidious discrimination in a particular legislative apportionment plan, the question is not what effect a proper apportionment plan would have upon the *composition* of the particular *legislative body* involved. The question rather is what effect such a scheme would have upon the *people involved*. The *members* of the *Pennsylvania House of Representatives* are not the victims of discriminatory apportionment. The *people of Pennsylvania* are.

II. The Lower Court's Decision With Regard to the Pennsylvania Senatorial Apportionment Act Is Correct.

A. This Court Need Not Pass Upon the Validity of the Senatorial Apportionment Act.

There can be no question that the decision of the lower court with regard to the apportionment of the Pennsylvania House of Representatives should be affirmed on the basis of this Court's decision in *Reynolds v. Sims*, 84 S. Ct. 1362 (1964). For this reason alone this Court need not review the questions presented with regard to the Senate. *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 84 S. Ct. 1472 (1964), affirmed the decision of the three-judge District Court for Colorado where it appeared that the lower court had correctly invalidated the apportionment of the Colorado Senate. This Court did not pass upon the validity of the apportionment of the Colorado House of Representatives, concluding (84 S. Ct. at 1485):

> "We need not pass on this question, since the apportionment of Senate seats, under Amendment No. 7, clearly involves departures from population-based representation too extreme to be constitutionally permissible, and there is no indication that the apportionment of the two houses of the Colorado General Assembly, pursuant to the 1962 constitutional amendment, is severable."

Since there is likewise no evidence that the Pennsylvania legislation is severable, this Court need not pass upon the apportionment of the Pennsylvania Senate.

B. The Senatorial Districts Are Grossly Disproportionate.

Should the Court decide to consider the validity of the Senatorial Apportionment Act, it is clear that the decision of the court below relative to the Pennsylvania Senate is correct.

The Court below specifically found that the Senatorial Apportionment Act creates senatorial districts which contain widely varying numbers of people. In some instances, a senator elected from one senatorial district will represent in excess of two and one-half times the number of persons who will be represented by a senator elected from another senatorial district. For example, the 10th District consisting of Bucks County with a population of 308,567; the 20th district consisting of Luzerne County with a population of 346,972; and the 39th District consisting of Westmoreland County with a population of 352,629, will each be represented by one senator. On the other hand, the 14th District consisting of Carbon, Monroe, Pike and Wayne Counties with a population of 129,851; the 36th District consisting of Somerset, Bedford and Fulton Counties with a population of 130,498; the 33rd District consisting of Franklin and Adams Counties with a population of 140,078; the 48th District consisting of Elk, Forest, Clarion and Venango Counties with a population of 144,516; and the 23rd District consisting of Tioga, Bradford, Susquehanna, Sullivan and Wyoming Counties with a population of 147,740 respectively, each will be represented by one senator also (Findings of Fact 15-17, J. S. A50-51).

Furthermore, certain over-represented, sparsely populated or rural districts adjoin under-represented, densely populated or urban districts. For example, the 14th and 23rd Districts which were over-represented adjoin the 20th District which is under-represented; and the 36th District which is under-represented adjoins the 39th District which is over-represented (Findings of Fact 18, J. S. A51). The Court below further found that 44.6% of the total population of Pennsylvania can elect a majority of the Senate (Findings of Fact 19, J. S. A51).

The degree of disproportion which exists in the Pennsylvania senatorial districts clearly violates the requirement that the Senate be apportioned on a population basis.

In *Reynolds v. Sims*, 84 S. Ct. 1362, 1382 (1964), this Court stated:

> "And, if a State should provide that the votes of citizens in one part of the State should be given *two times*, or five times, or ten times, *the weight of votes of citizens in another part of the State*, it could hardly be contended that the right to vote of those residing in the disfavored areas have not been effectively diluted." (Emphasis added.)

Moreover, in *WMCA, Inc. v. Lomenzo*, 84 S. Ct. 1418 (1964), this Court declared that New York Constitutional provisions which could create a Senate with a maximum population variance ratio of 2.6-to-1 were invalid. Thus, under the mandate for equality set forth by this Court, the Pennsylvania Senatorial Apportionment Act clearly is invalid for this reason alone.

C. The Constitutional Limitation on the Maximum Number of Senators Which Any County Can Receive Is Invalid.

As with the House, the population disparities in senatorial districts do not exhaust the discriminatory elements of the legislative apportionment scheme. In addition, Philadelphia County with a population of 2,002,512 or 8.85 senatorial ratios, is assigned only eight senators, as compared with the counties comprising the 14th, 23rd, 25th, 27th, 33rd, 34th, 36th and 48th Senatorial Districts, having a combined population of 1,170,290 or 5.17 ratios, which also are assigned eight senators (Findings of Fact 21, J. S. A51). This limitation on the senators allocated to Philadelphia is compelled by the provision of Article II, § 16 of the Pennsylvania Constitution which prohibits any county or city from having more than one-sixth of the total number of senators. Since the total number of senators is 50, this clause limits any county to a maximum of eight sena-

tors no matter how many persons it contains (Findings of Fact 30, A53).

The Court below concluded that the Senatorial Apportionment Act was discriminatory both in the disproportionate representation in the senatorial districts and in the limitation on the number of senators allocated to Philadelphia. Relying upon history, the court found the discriminatory provisions to have been motivated by an antiquated and repudiated political philosophy (229 F. Supp. 310, 325, J. S. A23).

> "It seems clear from the debates in the convention which produced the present Pennsylvania constitution that the provisions restricting representation of the more populous counties were the product of an agrarian philosophy which held that the inhabitants of the rural areas were more to be trusted with the responsibilities of government than the population of the cities, which contained a greater proportion of wicked and irresponsible men, as was said to be well known. *The defendants concede that the desire to protect the rural voters from domination by urban majorities was the basis for these restrictive provisions and they urge their validity.* We think, however, that they are but the vestigial remnants of an undemocratic philosophy of an earlier age, and that they cannot stand against the mandate of the Fourteenth Amendment that all persons, and not rural dwellers only, shall be given the equal protection of the laws." (Emphasis added.)

The lower court's determination is in harmony with the opinions of this Court which reject deviation from representation based on population, because of economic or geographic reasons. As this Court stated in *Reynolds v. Sims, supra* at 1382:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or

economic interests. . . . Weighing the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."

III. The Lower Court's Decision With Regard to the Multi-Member Districts Allocated by the House Apportionment Act Is Correct.

For the reasons stated above with regard to the Pennsylvania Senate (*supra*, p. 15) this Court need not pass upon the validity of that aspect of the House Apportionment Act relating to multi-member districts. It is a traditional canon of constitutional interpretation that this Court will not decide constitutional questions unnecessary to the disposition of a case. See *Ashwander v. TVA*, 297 U. S. 288, 341 (1936) (concurring opinion of Brandeis, J.). Should this Court, nevertheless, pass on the question, the Court below clearly was correct in its decision relating to multi-member districts.

The lower court found that the House Apportionment Act sets up a "curious pattern of representative districts in the larger counties" (229 F. Supp. 310, 326, J. S. A36). The court further found that in Philadelphia County there are 18 single-member districts, seven two-member districts and one three-member district. In Allegheny County there are eight single-member districts, five two-member districts, two three-member districts, and one four-member district. The court also found that "these varying districts follow no logical or consistent pattern" (Findings of Fact 58, J. S. A61).

The court further found that for no rational reason three adjoining counties with common geographic and socio-economic conditions and a largely homogeneous population are subdivided in a different manner. Berks County is subdivided into five single-member districts. Lancaster County is divided into one single-member and one four-member district. And York County is subdivided into four

single-member districts (Findings of Fact 63, J. S. A63). These are but isolated examples of the total "curious pattern."

The court observed that appellants offered no explanation for this crazy-quilt pattern (229 F. Supp. 310, 326, J. S. A38).

> "In the absence of any legislative history or other explanation justifying it, and we have found none, we can only conclude that this districting is either the result of gerrymandering for partisan advantage, as was suggested at the hearing, or that it is wholly arbitrary and capricious."

The court's specific findings that these districts follow no logical or consistent pattern; that they give certain voters greater voting power and influence in the legislative process than others; that they discriminate against political minorities; and that there is no rational basis either for the existence of the multi-member districts themselves or for the random manner in which they have been allocated among the Counties indisputably justify the court's conclusion that the provisions for such districts in the Representative Apportionment Act are invalid (see Findings of Fact 58-61, 79, J. S. A61-63, A65). The arbitrary and irrational classifications perpetrated in the multi-member districting violates the traditional requirements of the Equal Protection Clause as enunciated in *Reynolds v. Sims*, 84 S. Ct. 1362, 1383 (1964), where this Court stated:

> "And the concept of equal protection has been traditionally viewed as *requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.* With respect

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7. For other cases involving the same point see, *e.g.*, *Phillips Chemical Co. v. Dumas Independent School District*, 361 U. S. 376 (1960) (Tax Measure); *F. S. Royster Guano Co. v. Virginia*, 253 U. S. 412 (1920) (Tax Measure); *Morey v. Doud*, 354 U. S. 457 (1957) (Regulation of Currency Exchange); *Skinner v. Oklahoma*, 316 U. S. 535 (1942) (Sterilization of Habitual Criminals).

> to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment." (Emphasis added.)

Appellants rely upon dictum of this Court in *Reynolds v. Sims*, 84 S. Ct. 1362, 1389 (1964), which they contend recognizes the validity of multi-member districts. It is clear, however, that this Court merely was discussing theoretical possibilities wherein bicameral legislatures would have different compositions. Certainly this general theoretical language could hardly be construed to place the stamp of approval upon the curious and arbitrary pattern of multi-member districting involved in this case.

Moreover, it is clear from the opinion in *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 84 S. Ct. 1472 (1964) that lower courts and not this Court should have the primary responsibility for ascertaining the validity or invalidity of multi-member districts. Cf. *Reynolds v. Sims*, 84 S. Ct. 1362, 1390 (1964). The lower courts have a more intimate knowledge of the historical and political panorama of the states in which multi-member districts must be appraised. Thus they can bring to bear on the problem the familiarity with local conditions which will enable them to pierce the legislative haze that envelops voter discrimination.

If the opinion of the court below manifests one thing, it is an extraordinary grasp of the political situation in Pennsylvania and an incisive understanding of the course that Pennsylvania reapportionment should follow. The three-judge District Court has made clear findings that the Representative Apportionment Act has allocated the multi-member districts in an irrational, arbitrary, and partisan manner (Findings of Fact 58-70, J. S. A61-65). These findings should not be disturbed.

CONCLUSION.

Appellees respectfully submit that Appellants present no substantial questions for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

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Supreme Court of the United States

October Term, 1964
No. 201

WILLIAM W. SCRANTON, Governor et al.,
Appellants

v.

IRA WALTON DREW et al.,
Appellees

On Appeal from the United States District Court for the Middle District of Pennsylvania.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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